

Justin Fok, Esq., CA Bar: 242272
Law Offices of Jean D. Chen
2107 N. 1st Street, Suite 400
San Jose, CA 95131
Telephone: (408) 437-1788
Facsimile: (408) 437-9788
Email: jfok@jclawoffice.com

Attorney for Plaintiff
Hao Xu

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

Hao Xu;

Case No. C 07-3383 PVT

Plaintiff,

V.

**OPPOSITION IN SUPPORT OF
PLAINTIFFS CROSS MOTION FOR
SUMMARY JUDGMENT**

Peter D. Keisler^{*}, United States Acting Attorney General, U.S. Department of Justice;
Michael Chertoff, Secretary of the Department of Homeland Security;
Emilio T. Gonzalez, Director of United States Citizenship and Immigration Services;

Date: Hearing date vacated by court order
Judge: Hon. Patricia V. Trumbull

Emilio T. Gonzalez, Director of United States
Citizenship and Immigration Services;

Defendants.

I. DEFENDANT MICHAEL CHERTOFF SHOULD REMAIN

Plaintiff does not object to dismissing Defendants Peter D. Keisler^{*}, and Emilio T. Gonzalez, from this action.

* Alberto Gonzales resigned as Attorney General on September 17, 2007. Peter D. Keisler has currently been placed as the Acting Attorney General.

II. ADJUDICATION OF PLAINTIFFS' I-485 APPLICATIONS IS A NON-DISCRETIONARY ACTION THAT MUST BE COMPLETED WITHIN A REASONABLE TIME

Defendants argue that the pace of Plaintiffs application is at the complete discretion of the Attorney General and that Plaintiff is not entitled to a decision within any particular time frame. However, numerous courts, including the Northern District of California have found that the duty to adjudicate Plaintiffs' applications is non-discretionary and must be completed within a reasonable time. *See Wu v. Chertoff, et. al.*, 2007 WL 1223858, *3 (N.D.Cal.) (holding that a clear and certain right exists to have immigration status adjustment applications adjudicated in a reasonable time frame); *Gelfer*, 2007 WL 902382 at *2 (the government has a statutorily prescribed duty to adjudicate a petitioner's immigration status adjustment application 'within a reasonable time' under 5 U.S.C. §555(b)). Further, to allow the USCIS a limitless amount of time to adjudicate petitioner's application would be contrary to the "reasonable time" frame mandated under 5 U.S.C. 555(b) and ultimately would negate the USCIS's duty under 8 C.F.R. 245.2(a)(5). *See Singh*, WL 389817 at *3; *Gelfer*, WL 902382 at *2.

III. FBI NAME CHECK

The Defendant offers no particularized reason as to why Plaintiff's I-485 application is suffering from such long delays other than to give the generic and non-specific explanation that Plaintiff Xu's "name check remains pending." *See Stearns Declaration* ¶17. Defendants argue that the FBI's name check process is done on a first in first out basis and the effect of expedition would intrude on "first in line" applicants. *See Motion* at 10. Yet according to the USCIS' posted processing times, I-485 applications, on average, are processed within 6-8 months of filing. *See Complaint*, Exhibit 5. Given this average processing time it is difficult to imagine that there are many I-485 name checks that are "first in line" ahead of Plaintiff. If there are applicants who have been waiting over three and a half years for their name check in front of Plaintiff, the Defendants have presented no evidence showing how many there are, or indeed if there are *any*, before Plaintiff. Even given the normal fluctuations inherent in application processing times, a disparity of three years from the average processing time departs from the rule of reason and is not demonstrative of a "first in, first out" procedure for the name checks.

CONCLUSION

This Court should deny the defendants' motion for summary judgment as the defendants have failed to show that their delay has been reasonable as a matter of law. Instead, this Court should grant Plaintiffs motion for summary judgment and order the USCIS to expedite Plaintiff's application, which has been under review for nearly three and a half years. Plaintiff has a clear right to relief under both the Mandamus Act and the Administrative Procedures Act, and Defendants have a clear non-discretionary duty to complete adjudication of Plaintiff's I-485 application within a reasonable time. For these reasons, Plaintiff respectfully requests that the Court grant summary judgment in his favor.

Dated: October 30, 2007

Respectfully Submitted,

_____/s/
Justin G. Fok
Attorney for Plaintiffs